

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 100

PETER H. KLOPFER, PETITIONER,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NORTH CAROLINA

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[fol. 1]

**SUPREME COURT OF NORTH CAROLINA  
FIFTEENTH DISTRICT**

No. 829

Fall Term 1965  
From Orange

STATE,

v.

PETER KLOPPER.

Before Johnson, J., August 1965 Criminal Session,  
Orange Superior Court—Defendant Appealed.

Office of the Chief Justice of the Supreme Court of the  
State of North Carolina

**ORDER ASSIGNING JUDGE TO SUPERIOR COURT OF  
ORANGE COUNTY, NORTH CAROLINA**

To the Clerk of the Superior Court of Orange County:

This is to certify that the Honorable Clarence W. Hall, Judge of the Superior Court, has been assigned to hold the regularly scheduled sessions of Superior Court for Orange County during the period beginning 1 January 1964, and ending 30 June 1964.

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina on this 18th day of December 1963.

Emery B. Denny, Chief Justice of the Supreme  
Court of North Carolina.

Attest:

Bert M. Montague, Administrative Assistant.

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[fol. 2]

**IN THE SUPERIOR COURT OF ORANGE COUNTY**

**NORTH CAROLINA**

**STATEMENT OF CASE**

**State of North Carolina  
Orange County**

Be It Remembered, that at a Superior Court duly and regularly begun and held for the County of Orange, at a time and place required by law, to-wit: at the courthouse in Hillsborough, on the 24th day of February, in the year of our Lord one thousand nine hundred and sixty-four, before the Honorable C. W. Hall, Judge, duly commissioned, authorized and empowered to hold said court, upon the oath of E. P. Barnes, Foreman, George V. Taylor, and others (naming them), good and lawful men and women of the county aforesaid, duly summoned, drawn, sworn and charged, to inquire for the State of and concerning all crimes and offenses committed within the body of said county, it is presented in manner and form, that is to say:

**SUPERIOR COURT**

**February Term 1964**

**State of North Carolina  
Orange County**

**BILL OF INDICTMENT—February 24, 1964**

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as owner who had, as



owner; the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and [fol. 3] dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 3556

STATE,

v.

PETER KLOPPER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.

Witnesses: Austin Watts, Jeppie Watts.

Those marked \_\_\_\_\_ sworn by the undersigned foreman, and examined before the Grand Jury; and this bill found  
x A True Bill.

E. P. Barnes, Foreman Grand Jury.

Commission from Chief Justice Emery B. Denny, to Judge Raymond B. Mallard to hold the three week special session of Superior Court for Orange County, beginning 2 March 1964, for the trial of criminal cases, appears in the original transcript of appeal.

[fol 2]

IN THE SUPERIOR COURT OF ORANGE COUNTY

NORTH CAROLINA

STATEMENT OF CASE

State of North Carolina

Orange County

Be It Remembered, that at a Superior Court duly and regularly begun and held for the County of Orange, at a time and place required by law, to-wit: at the courthouse in Hillsborough, on the 24th day of February, in the year of our Lord one thousand nine hundred and sixty-four, before the Honorable C. W. Hall, Judge, duly commissioned, authorized and empowered to hold said court, upon the oath of E. P. Barnes, Foreman, George V. Taylor, and others (naming them), good and lawful men and women of the county aforesaid, duly summoned, drawn, sworn and charged, to inquire for the State of and concerning all crimes and offenses committed within the body of said county, it is presented in manner and form, that is to say:

SUPERIOR COURT

February Term 1964

State of North Carolina

Orange County

BILL OF INDICTMENT—February 24, 1964

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as owner who had, as

owner, the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and [fol. 3] dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 8556

STATE,

v.

PETER KLOPFER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.

Witnesses: Austin Watts, Jeppie Watts.

Those marked \_\_\_\_\_ sworn by the undersigned foreman, and examined before the Grand Jury; and this bill found x A True Bill.

E. P. Barnes, Foreman Grand Jury.

Commission from Chief Justice Emery B. Denny, to Judge Raymond B. Mallard to hold the three week special session of Superior Court for Orange County, beginning 2 March 1964, for the trial of criminal cases, appears in the original transcript of appeal.

IN THE SUPERIOR COURT  
March Special Criminal Term 1964

No. 3556

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STATE,

v.

PETER KLOPPER.

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PLEA

The State being represented by Hon. Thomas D. Cooper, Jr., Solicitor and the defendant being represented by Hon. Wade Penny, Attorney. The defendant, through counsel, Pleads Not Guilty to Trespass. \*

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IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

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STATE,

v.

PETER KLOPPER.

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JURY IMPANELED

Whereupon the following jury is duly impaneled, to-wit:  
[fol. 4] Moody Morris, George P. Hogan, David M. Ray, Athena Parker, Howard McAdams, Virginia Julian, George Eubanks, Jane L. Joyner, John L. Carden, Jane M. Atkins, Barbara N. Jones, W. B. Coleman.



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IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

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STATE,

V.

PETER KLOPPER.

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WITHDRAWAL OF JUROR AND DECLARATION OF MISTRIAL

The Court in its discretion withdraws juror Mr. Hogan and declares a mistrial. The defendant will return Monday for a re-trial.

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IN THE SUPERIOR COURT  
April Criminal Term 1965

North Carolina  
Orange County

No. 3556

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STATE,

V.

PETER KLOPPER.

(Continued for the term).

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Commission from Chief Justice Emery B. Denny, to Judge William A. Johnson, to hold the regularly scheduled sessions of the Superior Court for the Fifteenth Judicial District during the period beginning July 1, 1965 and ending December 31, 1965, appears in the original transcript.



**IN THE SUPERIOR COURT OF ORANGE COUNTY****No. 3556**

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**STATE,****v.****PETER KLOPPER.**

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**ORDER ALLOWING NOL PROS AND APPEAL THEREFROM**  
**Nol Pros With Leave.**

**The defendant, through counsel, Honorable Wade Penny,**  
**Excepts. Notice of Appeal.**

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**IN THE SUPERIOR COURT OF ORANGE COUNTY****No. 3556**


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**STATE,****v.****PETER KLOPPER.**

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**ORDER ALLOWING NOL PROS AND APPEAL THEREFROM**

The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open Court. Further notice [fol 5] waived. Defendant is allowed 15 days in which to prepare statement of case on appeal and the State is allowed ten days thereafter to file counter case or exceptions. Appeal bond in the sum of \$200.00 adjudged sufficient. No appearance bond required.



The Foregoing Is Certified by the Clerk of the Superior Court on November 15, 1965.

### Organization of Court

On Monday, February 24, 1964, the Grand Jury for the County of Orange, being duly constituted and sworn, returned the following Bill of Indictment—a true Bill against the defendant, Peter Klopfer, in open Court at the February 1964 Criminal Session of the Superior Court of Orange County—the Honorable C. W. Hall, Judge Presiding:

### IN THE SUPERIOR COURT OF ORANGE COUNTY

### BILL OF INDICTMENT

### SUPERIOR COURT

February Term 1964

State of North Carolina  
Orange County

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as (owner), who had, as (owner), the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, [fol. 6] against the form of the statute in such case made and provided and against the peace and dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 3556

STATE,

v.

PETER KLOPFER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.

Witnesses: Austin Watts, Jeppie Watts.

Those marked — sworn by the undersigned foreman, and examined before the Grand Jury; and this bill found x A True Bill.

E. P. Barnes, Foreman Grand Jury.

IN THE SUPERIOR COURT OF ORANGE COUNTY

MINUTE ENTRIES

Thereafter, at the March 1964 Special Criminal Session of the Superior Court of Orange County, the Honorable Raymond B. Mallard, Judge Presiding, the defendant, Peter Klopfer, was placed on trial to answer the charge set forth in the aforementioned Bill of Indictment. The State of North Carolina was represented by the Honorable Thomas D. Cooper, Solicitor, Tenth-A Solicitorial District, and the defendant was represented by counsel, Wade H. Penny, Jr., Esq.

The defendant entered a *plea* of Not Guilty, and a jury was duly sworn and impaneled. After hearing the evidence for the State and the defendant, the argument of counsel and the charge of the Court, the jury was unable upon due deliberation to agree upon a verdict. The Court thereupon withdrew a juror and entered an order of mistrial.

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County the Solicitor, the Honorable Thomas D. Cooper, Jr., indicated to the defendant's attorney, Wade H. Penny, Jr., his intention to have [fol. 7] a nol pros with leave entered in the defendant's case. At the April 1965 Criminal Session of the Superior Court of Orange County, with the Honorable William Y. Bickett, Judge Presiding, the defendant, through his attorney, was heard in open Court in opposition to the entry of a nol pros with leave in regard to the aforesaid trespass charge. The defendant's contention at that time was that the trespass charge against the defendant was abated on the authority of the *Hamm* and *Lupper* decision of the United States Supreme Court, 85 S. Ct. 384 (decided December 14, 1964). The Court indicated it approved the entry of a nol pros with leave in the defendant's case. The Solicitor, however, stated he did not desire now to have a nol pros with leave entered in the defendant's case and wanted to retain the case in its trial docket status. The defendant's case was continued for the term at that time.

The trial calendar for the August 1965 Criminal Session of the Superior Court of Orange County did not list the defendant's case for trial. To ascertain the trial status of the defendant's case the following motion was filed:

IN THE SUPERIOR COURT

August Criminal Session 1965

State of North Carolina  
Orange County

No. 3556

MOTION TO INQUIRE INTO TRIAL STATUS, ETC.—

Filed August 7, 1965

Now comes the defendant, Peter Klopfer, by and through his attorney, Wade H. Penny, Jr., and respectfully shows unto the Court as follows:



1. That the defendant was charged with the criminal offense of trespass in a bill of indictment returned by the Grand Jury of Orange County at the 1964 February Criminal Session of the Superior Court of Orange County, which Bill of Indictment reads in substance as follows:

"The jurors for the State upon their oath present, that Peter Klopfer, late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route No. 3, Chapel Hill, Orange County, North Carolina, said Austin Watts, being then and there in actual and peaceable possession of said premises as owner, who had, as owner, the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

2. That at the 1964 March Special Criminal Session of the Superior Court of Orange County, the defendant, Peter Klopfer, was brought to trial upon the aforesaid bill of indictment, which proceeding terminated in an order of mistrial because of failure of the jury to agree upon a verdict.

3. That the offense of trespass with which the defendant is charged arose out of an attempt by the defendant and others to obtain service at a restaurant which was a "place of public accommodation" within the meaning of the 1964 Federal Civil Rights Act which was subsequently passed in the summer of 1964; that the Supreme Court of the United States in the *Hamm* and *Lupper* decision, 85 S. Ct.

384, decided December 14, 1964, held that the Civil Rights Act of 1964 has retroactive effect so as to bar pending [fol. 9] prosecutions of persons who previously sought service at establishments which were included as a "place of public accommodation" in the Civil Rights Act of 1964; that this principle was subsequently applied by the Supreme Court of the United States in the case of *Blow v. North Carolina*, 85 S. Ct. 635, decided February 1, 1965, which case was reported originally along with a companion case in 261 NC 463, 135 SE 2d 14, and 261 NC 467, 135 SE 2d 17, and which case bears a striking similarity as to its operative facts with the facts in the case pending against the defendant.

4. That the defendant, Peter Klopfer, contends that the prosecution pending against him is barred and abated by the authority of the cases cited above; and that, at the very least, the effect of the cases cited above is to render the bill of indictment pending against the defendant fatally defective in that said bill of indictment purports on its face to make unlawful the exercise of a legal right which was secured to the defendant by the passage of the Civil Rights Act of 1964, which right to obtain service was given retroactive effect by the cases cited above.

5. That it has now been some eighteen months since the defendant was charged in said pending bill of indictment; that the next regular session of the Superior Court of Orange County at which criminal cases may be tried does not begin until December 13, 1965, said session being a one-week mixed session; that the Solicitor for the State has previously proposed to enter a nol pros with leave in the charge pending against the defendant to which entry the defendant objected and does now strenuously object in view of the circumstances cited above; that the continued pendency of said charge against the defendant is causing substantial and recurring problems in regard to the defendant's scheduling lecture and conference trips out- [fol. 10] side the State of North Carolina and trips outside

the United States in connection with research projects of the defendant, said defendant being a Professor of Zoology at Duke University and said research including projects for the Defense Department of the United States Government; that the defendant seeks to have said charge pending against him permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible.

Wherefore, the defendant, Peter Klopfer, by and through his attorney, Wade H. Penny, Jr., petitions the Court that the Court in the exercise of its general supervisory jurisdiction inquire into the trial status of the charge pending against the defendant and to ascertain the intention of the State in regard to the trial of said charge and as to when the defendant will be brought to trial.

Respectfully submitted, this  
7th day of August 1965.

Wade H. Penny, Jr., Attorney for Defendant, Peter Klopfer.

Filed: Saturday, August 7, 1965.  
C. S. C. Orange County.

IN THE SUPERIOR COURT OF ORANGE COUNTY

ENTRY OF NOL PROS WITH LEAVE

In response to the foregoing Motion, the status of the defendant's case was considered in open Court on Monday, August 9, 1965, by the Honorable William A. Johnson, Judge Presiding, at the August 1965 Criminal Session of the Superior Court of Orange County. The Solicitor moved the Court that the State be allowed to take a nol pros with leave.

Motion Allowed.

The defendant objected and took exception to the entry of the nol pros with leave.

Exception No. 1.



[fol. 11]

## IN THE SUPERIOR COURT OF ORANGE COUNTY

## APPEAL ENTRIES

The defendant gives notice of appeal in open Court. Further notice waived. The defendant is allowed 15 days in which to prepare statement of case on appeal and the State is allowed ten days in which to file counter case or exceptions. Appeal bond in the sum of \$200.00 adjudged sufficient. No appearance bond required.

## IN THE SUPERIOR COURT OF ORANGE COUNTY

## GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

The defendant appellant excepts and assigns as error the following:

1. The Court erred under the law of the State of North Carolina in allowing the entry of nol pros with leave in the defendant's case.

Exception No. 1 (R p 10)

2. The Court erred in allowing the entry of a nol pros with leave in the defendant's case under the circumstances there existing for the reason that said entry deprives the defendant of rights secured to him by the 1964 Federal Civil Rights Act and the United States Constitution.

Exception No. 1 (R p 10)

3. The Court erred in allowing the entry of a nol pros with leave in the defendant's case over the objection of the defendant for the reason that said entry effectively deprives the defendant of rights secured to him by the United States Constitution, including the right to an impartial, fair and speedy trial as required by the Fourteenth Amendment to the United States Constitution.

Exception No. 1 (R p 10).



[fol. 12] The foregoing is respectfully tendered by the defendant appellant as the statement of case on appeal.

This 28th day of August 1965.

Wade H. Penny, Jr., Attorney for Defendant Appellant.

#### Acceptance of Service

Service of the foregoing case on appeal is accepted and receipt of a copy thereof is acknowledged.

This 28th day of August 1965.

Thomas D. Cooper, Jr., Solicitor, Tenth-A Solicitorial District.

#### IN THE SUPERIOR COURT OF ORANGE COUNTY

#### STIPULATION OF COUNSEL

In apt. and proper time, counsel for the appellant and the Solicitor for the State stipulated and agreed that the foregoing should be and constitute the case on appeal to the Supreme Court of North Carolina.

This 15th day of November 1965.

Wade H. Penny, Jr., Attorney for Appellant.

Thomas D. Cooper, Jr., Solicitor, Tenth-A Solicitorial District.

[fol 13]

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term, 1965

No. 829—From Orange

STATE,

v.

PETER KLOPFER.

OPINION—January 14, 1966

Appeal by defendant from Johnson, J., August, 1965  
Criminal Session, Orange Superior Court.

This criminal prosecution was founded upon a bill of indictment signed by Thomas J. Cooper, Solicitor, and submitted by him to the Grand Jury and returned a true bill by that body at its February, 1964 Session, Orange Superior Court. The indictment charged that on January 3, 1964, the defendant "did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts . . . located on Route 3, Chapel Hill; North Carolina, . . . Watts being then and there in peaceable possession, and the said Peter Klopfer, after being ordered to leave the said premises willfully and unlawfully refused to do so, knowing he . . . had no license therefor . . . etc."

At the March, 1964 Special Criminal Session, the defendant, represented by counsel of his own selection, entered a plea of not guilty. The issue raised by the indictment and the plea was submitted to the jury which, after deliberation, was unable to agree as to the defendant's guilt. The court declared a mistrial and ordered the case set for another hearing. Thereafter, the record discloses the following:

"No. 3556—State v. Peter Klopfer

"The State moves the Court that it be allowed to take a *nol pros* with leave. The motion is allowed. Defendant takes exception to the entry of the *nol pros* with leave and gives notice of appeal in open court."

T. W. Bruton, Attorney General,  
Andrew A. Vanore, Jr., Staff Attorney, for the State  
Wade H. Penny, Jr., for defendant appellant.

Higgins, J.

The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against [fol. 14] him in the Superior Court. Stated another way, he insists his objection takes away from the solicitor and the court the power and authority to enter the order. The reason assigned is that the procedure denies him his constitutional right of a speedy trial.

When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial. "A *nolle prosequi*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Wilkinson v. Wilkinson*, 159 NC 265, 74 SE 968; *State v. Thurston*, 35 NC 256. Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems

to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is

*Affirmed.*

[fol. 15]

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1965

No. 829 Orange County

STATE,

VS.

PETER KLOPPER.

JUDGMENT—January 14, 1966

This cause came on to be argued upon the transcript of the record from the Superior Court Orange County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Carlisle W. Higgins Justice, be certified to the said Superior Court, to the intent that the Judgment Is Affirmed

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-Three and No/100 dollars (\$33.00),



and execution issue therefor. Certified to Superior Court this 24th day of January 1966.

A True Copy.

Adrian J. Newton, Clerk of the Supreme Court.

By: Kathryn W. Bartholomew, Deputy Clerk.

[fol. 16]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE,

v.

PETER KLOPPER.

CLERK'S CERTIFICATE

Appeal docketed 16 November 1965

Case argued 14 December 1965

Opinion filed 14 January 1966

Final Judgment entered 14 January 1966

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 7th day of April 1966.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina.

(Seal)

[fol 17]

**SUPREME COURT OF THE UNITED STATES**

**No. 1216, October Term, 1965**

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**PETER H. KLOPPER, Petitioner,**

**v.**

**NORTH CAROLINA.**

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**ORDER ALLOWING CERTIORARI—May 31, 1966**

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.